



Comptroller General
of the United States
Washington, D.C. 20548

147449 Gary

Decision

Matter of: Phoenix Products, Inc.

File: B-248790; B-248791

Date: August 17, 1992

Cecelia Bryant, Esq., for the protester.
Paul Robertson, for EcoVault Sales Corporation, an
interested party.
James L. Weiner, Esq., Department of the Interior, for the
agency.
Stephen J. Gary, Esq., Office of the General Counsel, GAO,
participated in the preparation of this decision.

DIGEST

Where protester was given specific reasons why its offered fuel storage tanks were considered unacceptable 22 working days before formal rejection of its offer for the same reasons, its protests filed after the formal notification were untimely; protests had to be filed not later than 10 working days after first notice of agency's adverse determination.

DECISION

Phoenix Products, Inc. protests the award of purchase orders to EcoVault Sales Corporation, under request for quotations (RFQ) Nos. FWS-92-4A-53 and FWS-92-4A-54, issued by the Fish and Wildlife Service (FWS), Department of the Interior, for fuel storage tanks. Phoenix contends that it should have received the purchase orders, since the lower priced product that it offered met all RFQ specifications.

We dismiss the protests as untimely.

The RFQs were issued on February 19, 1992, under small purchase procedures. Each solicitation requested quotes for the installation of two above-ground storage tanks, one for gasoline and one for diesel fuel; the tanks were to be installed at FWS facilities at Welaka, Florida (FWS-92-4A-53) and Savannah, Georgia (FWS-92-4A-54). The specifications, which were the same for both solicitations, provided for steel tanks and secondary containment units; the containment units, in turn, were defined as "Containment:

Concrete Vault . . . Minimum 6-inch thick reinforced concrete encasement all around the steel tanks."

Quotes were opened on March 6. Phoenix submitted the lowest quotes, offering a product consisting of an inner steel tank, surrounded by concrete, which in turn was surrounded by a steel exterior.² Following a technical review of Phoenix's descriptive literature, the agency requested clarifications; after considering Phoenix's responses, FWS advised the firm orally on May 11, and in writing on May 12, that its quotations had been rejected "because the tanks your company proposed provide for an outer steel shell, while our specifications . . . require that the outer shell be reinforced concrete." (Emphasis in original.) Phoenix then filed these protests on May 20.

Phoenix argues that its product should have been accepted because it met all specifications; according to the protester, although the specifications were silent as to whether the concrete encasement vault could be covered with a steel exterior, they did not preclude it. FWS responds that exposed concrete was explicitly specified, and that a steel exterior did not meet its minimum needs, because (among other things) a concrete exterior requires less maintenance than steel and is not vulnerable to rust. FWS also explains that Phoenix's product was unacceptable because it used poured concrete, not reinforced and pre-cast concrete as specified; pouring concrete between two layers of steel, it determined, would result in unacceptable voids in the concrete vault.

We will not consider the merits of these protests, since we find they were untimely filed. The contracting officer's notes (included in the agency report) show that, in a memorandum to the contracting officer dated March 25, FWS' engineering division stated that Phoenix's product was unacceptable because (1) the concrete comprising the containment vault was not reinforced, as specified in the RFQs; and (2) Phoenix's design--requiring that concrete be poured between inner and outer steel shells--would result in a void formation between the two shells. On April 13, when Phoenix contacted FWS to inquire about the procurement, the contracting officer advised Phoenix of these specific unacceptability findings.

¹Offerors were required to submit descriptive literature with their quotes to demonstrate compliance with all specifications.

²The two types of tanks offered by Phoenix differed in capacity, but shared the same design.

Although Phoenix asserts that it was not advised that a steel exterior was a problem until its quote was formally rejected on May 11, this chronology shows that it was advised of the unacceptability of that design on April 13. (In two sets of comments on the agency report, Phoenix has not disputed the accuracy of this portion of the report.)

In addition, in an April 20 letter to the agency, Phoenix confirmed its understanding of the agency's reasons for finding its product unacceptable, stating in pertinent part that:

"The specifications call for reinforcement of concrete with the use of either rebar or welded wire mesh. These types of reinforcement are called for when a pre-cast concrete vault is used which is exposed and has no structural strength of its own [Phoenix's product] has . . . concrete sandwiched in between the two [steel] walls While we understand that your specification has been written around the use of exposed pre-cast concrete vaults, we believe that the intent of the specifications was to provide a vaulted tank with a high degree of quality and durability." (Emphasis added.)³

Under our Bid Protest Regulations, to be timely a protest must be filed within 10 working days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) and (3) (1992); Adrian Supply Co.--Recon., B-242819.3, July 17, 1991, 91-2 CPD ¶ 64. Phoenix's April 20 letter shows it knew the precise reasons why the agency considered its product unacceptable, apparently based on its April 13 conversation with the agency. Specifically, Phoenix acknowledged that the specifications called for "the use of exposed pre-cast concrete," as distinct from the use by Phoenix of poured "concrete sandwiched in between" two steel shells. In thus distinguishing its own product from the type called for in the specifications, Phoenix demonstrated that it plainly understood the agency's adverse view that exposed concrete was called for and that concrete covered by an additional layer of steel had been determined

³The letter also addressed the agency's concerns about unacceptable "voids in the concrete." Although Phoenix elsewhere argues that it was denied the same access to FWS' engineers that the awardee had, and therefore did not have the opportunity to explain its product's features, this letter and other documents in the record show that Phoenix explained its product in considerable detail. Our review indicates no basis for the allegation that the two firms were treated unequally.

unacceptable. To be timely, therefore, Phoenix's protests had to be filed not later than 10 working days after April 20, that is, by May 4.⁴ Because Phoenix did not file its protests until May 20, they are untimely and we will not consider them.⁵ See Adrian Supply Co.--Recon., supra (protester's letter to agency, addressing reasons advanced by agency for its adverse position, showed that protester knew of basis for protest at time letter was written).

Phoenix argues that its protest was timely because, prior to May 11, it had not been told that its offer had been rejected. In support of this position, Phoenix notes that the agency continued to discuss its product up until its actual rejection on May 11. (On that date, Phoenix attempted to modify its offer by volunteering to provide wire mesh reinforcement in its concrete.) This argument misses the point. What is pertinent is that, as the April 20 letter shows, the protester knew that its product would be rejected; Phoenix could not defer filing its protest until the agency actually took the action of sending a rejection notice. In effect, Phoenix's letter, as well as its May 11 offer to modify the product it had quoted, were attempts to persuade FWS to modify its unacceptability determination, notwithstanding the product's acknowledged noncompliance with the specifications. However, such attempts to persuade an agency to change its position as to the acceptability of an offer do not toll our timeliness requirements. Allied-Signal, Inc., B-243555, May 14, 1991, 91-1 CPD ¶ 468, aff'd, B-243555.2, July 3, 1991, 91-2 CPD ¶ 19; see also, General Hone Corp., B-242357.2, Mar. 22, 1991, 91-1 CPD ¶ 322 (agency's continuing discussion with protester does not toll timeliness requirements once agency clearly has taken position that constitutes adverse agency action); American Productivity & Quality Center, B-242703, Jan. 18, 1991, 91-1 CPD ¶ 60.

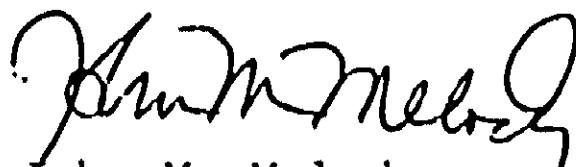
Phoenix's protests are untimely for a second reason. It was clear from the face of the solicitations that Phoenix's product did not conform to the specifications as written.

⁴FWS argues that in fact Phoenix was aware of these concerns prior to April 13 or April 20. We need not determine whether this was the case, since the protests are untimely based on the evidence of the April 20 letter alone.

⁵Although Phoenix argues that its April 20 letter distinguished the "intent" of the specifications from what they required on their face, we fail to see the significance of this distinction; the letter showed that Phoenix's product did not comply with the specifications as written, regardless of what "intent" Phoenix wished to read into them.

As noted above, Phoenix itself acknowledged this when it stated that "we understand that your specification has been written around the use of exposed pre-cast concrete," while its own product utilized concrete that was poured between two steel walls. If Phoenix believed that its product, though noncompliant with the plain language of the specifications, nonetheless met the agency's actual needs, it should have protested the RFQs' specifications on this basis prior to the March 4 closing date. See 4 C.F.R. § 21.2(a)(2).⁶

The protests are dismissed.



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⁶Phoenix has not explained how the statements in its April 20 letter, acknowledging that its product did not comply with the specifications as written, were consistent with its present position that its product did meet all specifications.